NO. 22066

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY MARTINETTO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

1200 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 22066

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY MARTINETTO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

1200 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

		Page
Table of Authorities		ii
JURISDICTION AND STATEMENT OF THE CASE		1
STATUTE AND REGULATIONS APPLICABLE TO THIS CASE		3
STATEMENT OF FACTS		7
ARGUMENT		13
I	THE DANIELS CASE DOES NOT HOLD THAT A JURY MAY DECIDE THE VALIDITY OF A DEFENDANT'S SELECTIVE SERVICE CLASSIFICATION.	13
II	APPELLANT COULD NOT APPEAL HIS CLASSIFICATION WHICH WAS GIVEN HIM AT HIS REQUEST BY THE APPEAL BOARD IN A 3-0 VOTE.	17
CONCLUSION		19
CERTIFICATE		20

TABLE OF AUTHORITIES

Cases

	Page
Blalock v. United States, 247 F. 2d 615 (4th Cir. 1957)	15
Cox v. United States, 332 U. S. 442, 68 S. Ct. 115, 92 L. Ed. 59 (1947)	17
Daniels v. United States, 372 F. 2d 407 (9th Cir. 1967)	13, 14
Dickinson v. United States, 346 U. S. 389 (1953)	15, 16
Estep v. United States, 327 U. S. 114 (1946)	15
Reed v. United States, 205 F. 2d 219 (9th Cir. 1953)	14
United States v. Jackson, 369 F. 2d 936 (4th Cir. 1966)	14
United States v. Petiach, 357 F. 2d 171 (7th Cir. 1966)	14
United States v. Stewart, 322 F. 2d 592 (4th Cir. 1963)	16

Statutes

Title 18, United States Code, §3231	3
Title 18, United States Code, §3237	3
Title 18, United States Code, §4208(a)(2)	2
Title 28, United States Code, §1291	3
Title 28, United States Code, §1294	3
Title 50 Appendix, United States Code, §462	3
Title 50 Appendix, United States Code, §456(j)	4

Regulations	Page
Title 32, Code of Federal Regulations:	
§1627.3	7, 18
§1660	5

NO. 22066

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY MARTINETTO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

JURISDICTION AND STATEMENT OF THE CASE

The appellant, Timothy Martinetto, was indicted on February 8, 1967, by the Federal Grand Jury [C. T. 2]. 1/

The indictment, which is in one count, essentially charges that the defendant, a registrant of Local Board No. 114, was classified in Class I-O and was notified of such classification; thereafter defendant was ordered by said Local Board to report to Local Board No. 114 at Downey, California, on September 27, 1966,

---

1/ "C. T." refers to Clerk's Transcript of Proceedings.

to be given instructions to proceed to a place of employment for civilian work contributing to the maintenance of the national health, safety and interest; and that defendant knowingly failed and neglected to perform a duty required of him under the Selective Service Act and the regulations promulgated thereunder in that he failed and neglected to report to said Local Board as so ordered to do [C. T. 2-3].

Appellant was arraigned on March 6, 1967, entered a plea of Not Guilty, demanded a jury, and, on April 10, 1967, trial was set for June 20, 1967, before the Honorable William P. Gray, United States District Judge [C. T. 7-9, 24].

On June 20, 1967, jury trial commenced and defendant was found guilty by the jury and sentenced, on June 21, 1967, to imprisonment for a period of three years with parole eligibility to be determined under Title 18, United States Code, Section 4208(a)(2) [C. T. 34-36].

Defendant filed Notice of Appeal on June 22, 1967 [C. T. 37], and Motion to Appeal in Forma Pauperis, on June 29, 1967 [C. T. 37-38].

On June 29, 1967, Judge Gray granted an order permitting appeal in forma pauperis, but did not order the preparation of a typewritten transcript, stating that:

> "The request for a reporter's transcript is denied, because there were no issues of fact, the defendant having admitted that he refused to report to the draft board as directed. The only possible

question on review is whether or not the Selective Service record shows that the defendant was accorded due process." [C. T. 40].

Appellant filed an opening brief, and the Government made a motion for an extension of time in which to file appellee's brief on the grounds that appellant's opening brief raised questions which could only be decided by this Court upon a Reporter's Transcript of Proceedings. An order extending time for filing appellee's brief to and including November 20, 1967 was granted on October 18, 1967, and a copy of the Reporter's Transcript has been supplied.

The jurisdiction of the District Court is predicated on Title 50, United States Code, Section 462, and Title 18, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28, of the United States Code.

STATUTE AND REGULATIONS APPLICABLE TO THIS CASE

Title 50 Appendix, Section 462, United States Code, provides in pertinent part as follows:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or

directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . . "

Title 50 Appendix, Section 456(j) states:

"(j) Conscientious Objectors. -- Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming

exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

Title 32, Code of Federal Regulations, Section 1660, provides in pertinent part as follows:

"1660.20 - Determination of type of Civilian work to be performed and order by the Local Board to perform such work.

"(a) . . . a registrant . . . shall submit to

the Local Board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. . . .

"(b) If the registrant fails to submit to the Local Board types of work which he offers to perform, . . . the Local Board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. . . .

"(c) If the Local Board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the Local Board is located or the representative of such State Director, appointed by him for that purpose, shall meet with the Local Board and the registrant and offer his assistance in reaching an agreement. . . .

"(d) If, after the meeting referred to in paragraph (c) of this section, the Local Board and registrant are still unable to agree upon a type of

civilian work which should be performed by the registrant in lieu of induction, the Local Board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1 which is deemed appropriate, . . . "

Title 32, Code of Federal Regulations, Section 1627.3, provides in pertinent part as follows:

"1627.3 Appeal to President.

"When a registrant has been classified by the appeal board and one or more members of the appeal board dissented from that classification, the registrant . . . may appeal to the President within ten days after the mailing by the local board of the Notice of Classification (SSS Form No. 110) notifying the registrant of this classification by the appeal board. . . . "

STATEMENT OF FACTS

Appellant's Selective Service file was received into evidence as Government's Exhibit No. 1 [R.T. 30], 2/ and disclosed the

---

2/ "R.T." refers to Reporter's Transcript of Proceedings. The Selective Service File of appellant will continue to be referred to in this brief as "Government's Exhibit No. 1".

following history of his case:

On July 17, 1961, defendant registered with Local Board No. 114, Downey, California (hereinafter referred to as the "Board") [Government's Exhibit No. 1, pp. 1, 2].

On October 12, 1962, the Board was advised that defendant was a full-time college student [Government's Exhibit No. 1, p. 15]. On December 14, 1962 the Board was advised that defendant was no longer enrolled in college [Government's Exhibit No. 1, p. 16].

On February 28, 1964, the Board received from defendant a completed Classification Questionnaire (SSS 100). Defendant indicated at Series VII that he was a Jehovah's Witness and at Series VIII that he was a Conscientious Objector. In regard to his physical condition he indicated that he was "going to an eye specialist" [Government's Exhibit No. 1, pp. 4-9].

On March 11, 1964, the Board received from defendant a completed Special Form for Conscientious Objector (SSS 150). Defendant indicated at Series IV 2(b) that he has "been associated with them (Jehovah's Witnesses) all my life and became a minister in 1957 by water immersion" [Government's Exhibit No. 1, pp. 12, 17-28].

On March 12, 1964, defendant was classified in Class 1-A and notice of such classification was mailed to defendant (SSS 110) [Government's Exhibit No. 1, pp. 3, 12]. Defendant did not appeal this classification within ten days.

On May 1, 1964, defendant reported for his physical

examination and on May 13, 1964, defendant was found acceptable and was so notified (DD 62) [Government's Exhibit No. 1, pp. 12, 29, 37].

On March 19, 1965, defendant was ordered to report for induction into the armed forces on April 27, 1965 [Government's Exhibit No. 1, pp. 12, 30].

On March 30, 1965, the Board received from defendant a letter in which he states inter alia " . . . I have not made an appeal as of yet, but I am doing so now" [Government's Exhibit No. 1, p. 31].

On April 8, 1965, the Board reviewed defendant's request and decided that defendant's induction should not be postponed and defendant was advised of the Board's decision [Government's Exhibit No. 1, pp. 12, 33].

On April 26, 1965, one day before defendant was to report for induction, the Board received a letter from defendant's doctor indicating that defendant was to have a cyst removed from his left hand. Acting upon this information the Board postponed defendant's induction for thirty days [Government's Exhibit No. 1, pp. 3, 12, 35, 36, 71-72].

On July 20, 1965, the Board ordered defendant to report for another physical examination on August 13, 1965. Defendant was again found to be acceptable and was so notified on August 26, 1965 [Government's Exhibit No. 1, pp. 12, 38, 44].

On August 4, and August 30, 1965, the Board received from defendant and defendant's mother various letters regarding

defendant's health [Government's Exhibit No. 1, pp. 39-42, 45, 46, 69]. These were forwarded to the induction station for re-evaluation on September 1, 1965 and returned to the Board on September 14, 1965 with the indication that re-evaluation was not warranted and defendant was so notified [Government's Exhibit No. 1, pp. 12, 48, 56].

On September 17, 1965, defendant was ordered to report for induction on October 5, 1965 [Government's Exhibit No. 1, pp. 12, 48]. On September 23, 1965, the Board received from defendant a letter indicating that he would report for induction but would not submit [Government's Exhibit No. 1, pp. 12, 49-52].

On October 5, 1965, defendant reported to the induction center and, having been found qualified for induction, refused to step forward and be inducted. Defendant's file was submitted to the United States Attorney's Office on October 29, 1965, and prosecution was declined in order that the Local Board could give further consideration to defendant's claim of conscientious objection [Government's Exhibit No. 1, pp. 12-13, 82-95].

On March 10, 1966, defendant appeared before the Board for a personal interview [Government's Exhibit No. 1, pp. 13, 96-98]. Defendant indicated in this interview that he was not a pioneer minister and that he spent about forty-five hours per month on religious work. Following this interview, defendant was again classified in Class I-A and notice of such classification was sent to defendant [Government's Exhibit No. 1, pp. 3, 13].

On March 21, 1966, defendant appealed this I-A classification

and on June 16, 1966 defendant was classified in Class I-O by the Appeal Board in a vote of 3-0, and notice of such classification was sent to defendant (SSS 110) [Government's Exhibit No. 1, pp. 13, 99-102].

On June 21, 1966, the Board mailed to defendant a Special Report for Class I-O Registrants (SSS 152) and this form was returned incomplete on June 30, 1966 [Government's Exhibit No. 1, pp. 13, 104-109].

On June 29, 1966, the Board received from defendant a letter of appeal of the I-O classification [Government's Exhibit No. 1, p. 103]. On June 30, 1966 the Board advised defendant that this classification was the decision of the appeal board [Government's Exhibit No. 1, p. 110].

On July 7, 1966, the Board mailed to defendant a letter setting out three types of appropriate work available for defendant as a I-O registrant and on July 18, 1966 this letter was returned to the Board with the indication by defendant that he did not wish to perform any of the types of work listed [Government's Exhibit No. 1, pp. 13, 112]. Defendant also indicated that he was "going to start in the full-time ministry on October 1, 1966" [Government's Exhibit No. 1, p. 114].

On August 12, 1966, defendant appeared at a meeting with the Board wherein he indicated that he was not a full time minister. The Local Board determined that work as an Institutional Helper at the Los Angeles County Department of Charities was appropriate and available work to be performed by defendant [Government's

Exhibit No. 1, pp. 118-120].

On September 16, 1966, defendant was ordered by the Board (SSS 153) to report to the Board on September 27, 1966, there to receive instructions to report to the Los Angeles County Department of Charities [Government's Exhibit No. 1, p. 13]. Defendant did not report on September 27 as ordered. Instead the Board received a letter from Defendant indicating that he would not report and that work with the Los Angeles County Department of Charities would interfere with his ministry [Government's Exhibit No. 1, p. 128].

On October 12, 1966 the Board received from the Los Angeles County Department of Charities a Form SSS 153 indicating that defendant did not report as ordered and had not reported [Government's Exhibit No. 1, p. 131].

Contrary to the inference in Appellant's Opening Brief, at pages 5-6, that the defendant was not permitted to take the stand and defend on the basis that he was improperly classified, appellant did take the stand and testified at length about his ministry as a Jeohovah's Witness [R. T. 39-76]. He admitted he had informed the Board that he was spending only ten hours a week on his ministry, and had not attained the full time ministry [R. T. 69-70]. Defendant further admitted that he had received the order to report, and had knowingly failed and refused to report, as alleged in the indictment [R. T. 62 and 71].

ARGUMENT

I

THE DANIELS CASE DOES NOT HOLD THAT A JURY MAY DECIDE THE VALIDITY OF A DEFENDANT'S SELECTIVE SERVICE CLASSIFICATION.

Appellant apparently contends that he was not given a "judicial review of his Selective Service Classification" [Appellant's Opening Brief, pp. 6-7 and 10] and although not specifically stated in the opening brief, a review of the record indicates he also attacks the court's instruction to the jury that the only issue decidable by the trier of fact was whether the defendant had been ordered to report for civilian work assignment, and if so, whether he knowingly failed to comply with such order. Although appellant readily admitted his failure to report as ordered, he contended that the jury should not have been precluded from deciding whether or not he was entitled to a ministerial deferment.

In this regard, he cites Daniels v. United States, 372 F. 2d 407 (9th Cir. 1967), as he did below, for the proposition that a registrant who has exhausted his appeals under the Selective Service System is entitled to a review of the propriety of his classification in a court of law by a jury [see R. T. pp. 3-10, 80-83].

The argument made below, and here inferentially, is that since he was not allowed to present to the jury evidence not before the Local Board at the time of classification so that the jury could decide whether his classification was invalid, a judicial review was

denied him by the court below [Appellant's Opening Brief, p. 10].

The specific holding in Daniels was that a Class I-O conscientious objector, who has passed his physical examination, exhausted his board appeal remedies, and been ordered to report to the board for assignment to a civilian employer, may defend a criminal action for failure to so report on the ground that his classification is invalid. Daniels held that such a person has reached the "brink" in the selective service process and would not have to go through the formality of reporting to the board or the civilian employer, before he would be allowed to contest the validity of his classification in a criminal proceeding. But Daniels did not even consider, let alone hold, the question of whether the jury as trier of fact should decide the validity of that classification. The validity of the classification, as Judge Gray pointed out below, is a question of law for the court [R. T. pp. 5-7]. United States v. Jackson, 369 F. 2d 936 (4th Cir. 1966); Reed v. United States, 205 F. 2d 219 (9th Cir. 1953). Once the court is satisfied that there is a basis in fact for the board's classification (as the court did in the instant case, R. T. pp. 83 and 88), the sole issue for the jury is whether or not defendant was ordered to report and if so, did he fail to obey the order. It is not within the province of the jury to consider defendant's eligibility for a ministerial exemption. United States v. Petiach, 357 F. 2d 171 (7th Cir. 1966).

In a criminal prosecution for a refusal to obey the Selective Service Board order "the scope of judicial inquiry into the administrative proceedings leading to defendant's classification is very

limited." Blalock v. United States, 247 F. 2d 615, 619 (4th Cir. 1957). The courts are not to weigh the evidence to determine whether the classification made by the Local Board was justified. The decisions of local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. Estep v. United States, 327 U.S. 114, 122 (1946).

In the instant case there was such basis in fact for the I-O rather than a IV-D classification.

As the court pointed out in Dickinson v. United States, 346 U.S. 389 (1953), at pp. 394-395:

> "The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act, 'is a narrow one, intended for the leaders of the various religious faiths and not for the members generally.' S. Rep. No. 1268, 80th Cong., 2d Sess. 13. Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. . . . Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under 6(g). These activities must be regularly performed. They must, as the statute reads,

comprise the registrant's 'vocation.' And since the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption (See 32 C.F.R., Section 1622.1(c))."

The burden is on the registrant to show that he is a leader, and not merely an active member of his sect, that he performs his religious duties as a vocation, rather than as an avocation. United States v. Stewart, 322 F.2d 592, 594-595 (4th Cir. 1963).

Appellant failed to satisfy these requirements. At the time the Order to Report for civilian work assignment was issued, appellant was not a full-time minister, nor was he a pioneer minister, nor even a vocation pioneer [Government's Exhibit No. 1, pp. 118-119]. Rather, he was employed in a full-time capacity at Bekins Van and Storage, earning $3.02 to $3.27 an hour [Government's Exhibit No. 1, p. 118]. While the mere fact that secular labor is performed by a defendant is unsufficient to serve as the basis for denial of the exemption, it is a point upon which the relative amount and type of secular activity may permit such a decision. Dickinson v. United States, 346 U.S. 389 (1953).

Here, the evidence supported the trial court's conclusion that defendant's classification was not without any basis in fact. Such a conclusion is a matter of law solely for determination by the court, and the jury was properly instructed to decide only whether or not defendant was ordered to report and if so, whether he failed

to obey the order. Cox v. United States, 332 U.S. 442, 68 S.Ct. 115, 92 L.Ed. 59 (1947).

II

APPELLANT COULD NOT APPEAL HIS CLASSIFICATION WHICH WAS GIVEN HIM AT HIS REQUEST BY THE APPEAL BOARD IN A 3-0 VOTE.

On March 10, 1966, defendant appeared before the Board for a personal interview [Government's Exhibit No. 1, pp. 13, 96-98]. He indicated in this interview that he was not a pioneer minister and that he spent about forty-five hours per month on religious work. Following this interview, defendant was again classified in Class I-A and notice of such classification was sent to defendant [Government's Exhibit No. 1, pp. 3 and 13].

On March 21, 1966, defendant appealed this I-A classification and on June 16, 1966 defendant was classified in Class I-O by the Appeal Board in a vote of 3-0, as the defendant had requested [Government's Exhibit No. 1, pp. 17-20, and 31; R.T. p. 86], and notice of such classification was sent to defendant (SSS 110) [Government's Exhibit No. 1, pp. 13, 99-102].

On June 29, 1966, the Board received from defendant a letter of appeal of the I-O classification [Government's Exhibit No. 1, p. 103]. On June 30, 1966, the Board advised defendant that this classification was the decision of the Appeal Board [Government's Exhibit No. 1, p. 110].

Appellant attempted to characterize this as a procedural defect at the trial, and Judge Gray stated:

> " . . . I am not able to conclude that the procedure was not properly followed in this case. The record shows that the defendant was classified 1-A. He appealed from that and requested a classification of 1-O. That was given to him. Then he seeks to appeal from that classification.
>
> "Well, I think there are two answers to that. One, I don't think that he can appeal from a classification that he himself has requested. That's the first thing.
>
> "The second thing, inasmuch as the reclassification was given on appeal at his request, there is no one to whom to appeal other than the Appeal Board, and the Appeal Board is the one that acceded to his request, and I just don't think there is any basis for further appeal." [R. T. p. 86].

And Judge Gray was clearly correct in saying that there was no further appeal open to the defendant. 32 C. F. R., Section 1627. 3 provides for appeal to the President of the United States only when a registrant has been classified by the Appeal Board and one or more members of the Appeal Board dissented from that classification. 32 C. F. R., Section 1627. 3.

Here, not only was the decision of the Appeal Board

unanimous, thus precluding further administrative appeal, but the Board classified defendant in accordance with his only requested classification - that of conscientious objector.

CONCLUSION

A review of the entire record indicates that there was no error prejudicial to the rights of appellant, and the judgment below should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.

WILLIAM J. GARGARO, JR.